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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: MAY 30 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, arts or business or member of the professions with experience equivalent to an advanced degree. The petitioner seeks employment as a systems engineer/computer hardware engineer employed by [redacted] Virginia. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that the petitioner qualifies for classification as an alien of exceptional ability, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue under consideration is whether the petitioner qualifies for classification either as a member of the professions holding an advanced degree or as an alien of exceptional ability in the sciences, arts or business. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k) states that the petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business:

> (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> > (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines an "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

The petitioner filed the Form I-140 petition on July 31, 2009. In an initial statement, counsel repeatedly stated that the petitioner "is a Member of the Professions Holding Advanced Degrees or Alien of Exceptional Ability," but did not specify whether the petitioner claimed to qualify as the former or as the latter. Simply declaring the petitioner to be one of the two cannot suffice to establish eligibility.

Counsel divided much of the introductory statement into sections with the headings "Contributions in the Field of Expertise," "Leading Role within Organizations with distinguished reputation" and "Evidence of High Salary for Self-Petitioner." These headings roughly correspond to the USCIS regulations at 8 C.F.R. §§ 204.5(h)(3)(v), (viii) and (ix):

> (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field . . . ;
>
> (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
>
> (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The above-cited regulations are among the evidentiary requirements for an entirely different immigrant classification, alien of extraordinary ability, under section 203(b)(1)(A) of the Act. Indeed, counsel referred to the petitioner's "extraordinary ability" in the introductory statement. The petitioner has not sought that classification in the present proceeding, and therefore those criteria are not relevant except where they reasonably overlap with the classifications at issue in this proceeding.

"Evidence of High Salary" relates to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D), evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. The other two headings, however, have no direct analog in the relevant regulations.

Likewise, counsel did not specifically say whether the petitioner claims to hold an advanced degree or post-baccalaureate experience equivalent to such a degree. The only educational credential that the petitioner submitted consisted of a copy of a 1992 diploma in Computer Technology from ECPI Computer Institute. The submitted documentation does not indicate that the diploma amounts to an academic degree, or that ECPI Computer Institute is a degree-granting institution rather than the vocational school that its name suggests. The petitioner claimed to have attended North Carolina State University from 1986 to 1988, but he claimed no degree from that institution, and the record contains no evidence from the university to show that he ever completed a course of study there.

The director issued a notice of intent to deny the petition on June 14, 2010. In that notice, the director quoted in full the regulatory requirements to show exceptional ability. The director also instructed the petitioner to submit further documentation of any advanced degree that the beneficiary holds. In response, counsel again cited the petitioner's "extraordinary ability" without addressing any of the regulatory standards for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Counsel stated: "the Self-Petitioner does not hold an advance [*sic*] degree but has the equivalent in years of experience. [The petitioner] has over 15 years of experience in the engineering industry."

By regulation at 8 C.F.R. §§ 204.5(k)(2) and (3)(i)(B), the equivalent of an advanced degree is five years of progressive post-baccalaureate experience. Therefore, the petitioner must hold at least a bachelor's degree in order for his subsequent experience to be the recognized equivalent of an advanced degree. Experience earned before earning a bachelor's degree is not post-baccalaureate, and therefore cannot count toward the required qualifying experience. The petitioner, however, submitted no evidence that he holds a bachelor's degree.

The director denied the petition on September 13, 2011, stating:

> Counsel did not claim [in response to the June 2010 notice] that the beneficiary qualified as an alien of exceptional ability; therefore, this decision will address advanced degree only.
>
> According to the regulations cited above, the equivalent of a Master's degree is a Bachelor's degree in the field and five years of **post baccalaureate** experience. The record does not indicate that the petitioner possesses a Bachelor's degree. Therefore, the petitioner cannot meet the advanced degree requirement through the definition of an advanced degree.

On appeal, counsel states: "The Service claimed that the evidence submitted establishes that the Self-Petitioner is eligible for classification as an alien of Exceptional Ability." The director made no such finding. Rather, as shown above, the director found no coherent claim that the petitioner qualifies for classification as an alien of exceptional ability, even after the director provided the petitioner with a second opportunity to correlate the evidence to the specified regulatory requirements. Counsel's mistaken reading of the decision does not put the issue back into play.

Counsel's subsequent appellate brief does not revisit the issue. Therefore, counsel has not contested the director's finding that the petitioner does not qualify for classification as a member of the professions holding the defined equivalent of an advanced degree. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

The petitioner put forth no coherent claim of eligibility either as an alien of exceptional ability or as a member of the professions holding an advanced degree. The petitioner, through counsel, merely listed all the submitted evidence with the vague assertion that the petitioner "is a Member of the Professions Holding Advanced Degrees or Alien of Exceptional Ability." The AAO will affirm the director's finding that the petitioner failed to establish eligibility under either classification.

The second and final issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. The petitioner cannot qualify for the waiver without first establishing that he qualifies as either an alien of exceptional ability or a member of the professions holding an advanced degree, but the director decided this issue on the merits and the AAO will do the same.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In an introductory letter, counsel stated that the petitioner:

> is a highly qualified Systems/Computer Hardware Engineer. He has over 15 years of experience . . . with CISCO Corporation. . . .
>
> His current primary areas of consultation include Optical Network Design, Storage Network Design, Campus-Switching, and Core-Routing. . . . He represented the Mid-Atlantic Area in the Optical and Storage TLP's (Technology Leadership Programs). As a member of the TLP, [the petitioner] authored "Opportunity Description Documents" . . . that helped drive the relevant Business-Units to develop features and platforms to meet the market demands for these Advanced Technologies. As a TLP member, his

> main responsibility is to act as a conduit between the [redacted]. His responsibilities within the [redacted] is foremost as a consultant and trusted advisor, to facilitate, design and solve complex Technical Business solutions, in a Pre-Sales capacity. As a Systems Engineer, he has received multiple awards from the organization for his excellence in and out of the field. . . .
>
> [The petitioner] contributes to the developments and advancements in the following sectors in the U.S.:
>
> - Internet Technology
> - Defense & Safety
> - Telecommunications Engineering
> - Network Security

Counsel asked, rhetorically, "What distinguishes [the petitioner] from other U.S. Workers with comparable professional qualifications?" and answered:

> Due to the Increasingly Global Nature of the Political, Business, and Security competitive landscape, the US Increasingly will benefit from citizens with foreign language skills and background in order to stay competitive as a world Economic leader, have a large stake in the dwindling market of 'natural-resources' (such as Oil and Minerals which are mostly in Middle-East & Africa) and averting threats from the emerging markets of Asia, Middle-East, Africa and South America.
>
> The combination of [the petitioner's] education, cultural background and technical skills certainly brings a unique asset to the US.

The above passage, however, failed to answer counsel's own question that preceded it.

The petitioner submitted letters from current and former employers and clients, but most of these letters did little more than list specific technical functions that the petitioner performed in the course of his employment. An exception is an October 30, 2008 letter from [redacted] Washington, D.C., who stated:

> I have worked with [the petitioner] since 2001 and can attest to both his superior technical ability and his personal and professional commitment to the success of the projects on which he assisted The George Washington University. Initially, [the petitioner] was assigned to the University as our Systems Engineer, assisting us with all of our technical needs. However, even after being reassigned, [the petitioner] has continued to be a key technical resource for some critical projects and on-going operational efforts at GW.

> [The petitioner] assisted GW with an ambitious project to build o[u]r first Dense Wav Division Multiplexing ring to connect two campuses which house the University's two data centers. . . .
>
> [The petitioner] worked with us tirelessly from developing the requirements, to designing and implementing the solution. The breadth and depth of his expertise was demonstrated on this project as we needed not only optical expertise to design and implement the service, but also guidance on how to handle synchronous storage replication between separated sites. . . .
>
> Since that project's completion, the University has received awards for our dual data center, active-active design and [the petitioner's] expertise was critical in the successful completion and operation of the ring.

The petitioner also submitted a copy of a November 12, 2008 letter from [redacted] University, Pittsburgh, Pennsylvania, who stated:

> [The petitioner] possesses extensive experience in Internet Technology and Telecommunications Engineering, experience which is complemented by his academic knowledge. His ability to solve technical problems through experiments in aspects of network communications engineering, specifically, demonstrates his exceptional value as an Internet and Telecommunications engineer. . . .
>
> [The petitioner] possesses a deep understanding of Internet and cyber-security, and has experience in these matters which are of serious significance to all Americans, and hence vital to the national interests of the United States. . . .
>
> Additionally, his extensive knowledge of 'Data Center' design benefits government agencies and other commercial enterprises. However, it is not too hard to see how this benefits the average citizen. For example, helping an agency such as FEMA implement a 'Disaster Recovery' solution ultimately helps that agency provide uninterrupted crucial services that benefit all Americans. In fact, during 9/11 and Katrina, [the petitioner] assisted the American Red Cross in implementing secure online services to handle internet based donations. . . .
>
> Few other experts in the fields of Internet Technology and Telecommunication Engineering possess the high-level experience in directing internet and telecommunications networks, or the ability to optimize their engineering processes with marked, substantiated improvement.

[redacted] did not identify the evidence, if any, that he reviewed prior to writing his evaluation, nor did he explain how he came to know of the petitioner's experience and achievements. [redacted]

simply declared that the petitioner is such a superior expert in his field that he should receive the national interest waiver.

In the June 14, 2010 notice of intent to deny the petition, the director instructed the petitioner that he "must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required." In response, the petitioner submitted copies of previously submitted materials as well as other documentation relating to various projects. Eligibility for the waiver is not inherently evident from the technical details of the petitioner's work or from the reputation of his employers and clients.

The petitioner also submitted a copy of an earlier letter from Dr. Shepherd, dated March 3, 2008, stating:

> [The petitioner] qualifies as an individual of extraordinary ability in the fields of Internet Technology and Telecommunications Engineering, possessing skills, knowledge, and achievements which would greatly serve the national interest of the United States. Moreover, it is my opinion, that the national interest of the United States would be adversely affected if he were required to obtain a labor certification, as he possesses the unique combination of professional achievement, scientific innovation, and leadership ability in the fields of Internet Technology and Telecommunications Engineering, to improve the technology and safety of Americans. These skills, unmatched by any U.S. worker with solely the minimum of credentials and experience, are vital and critical to the national interest of the United States, and hence, the national interest of the United States would be adversely affected if these skills were not put to good use for the benefit of the US and its citizens.
>
> . . . [H]e has been called upon to work with such high-profile, industry-leading clients as the Department of Energy, the Virginia Department of State, and the Library of Congress. Being called upon to hold high-level Engineer positions in prominent Telecommunications Engineering corporations, and to assist high-profile national and federal governmental agencies, clearly demonstrates his expertise and technical knowledge in Internet Technology and Telecommunications Engineering.
>
> . . . Few other experts in the fields of Internet Technology and Telecommunications Engineering possess the [same] high-level experience in directing internet and telecommunications networks, or the ability to optimize their engineering processes with marked, substantiated improvement. Therefore, [the petitioner's] unique combination of technical knowledge and leadership ability set him apart from other professionals in the field.

Counsel noted that the petitioner "provided technical consultative services to various government related agencies and organizations: Department of Energy, Department of State, Library of Congress and the Army." Serving government clients is not, on its face, evidence of eligibility for the waiver, and

the record contains nothing from those entities to establish the significance of the petitioner's work or to show to what extent his achievements lay beyond the capabilities of qualified United States workers.

In the September 13, 2011 denial notice, the director found that the petitioner had offered only general assertions in support of the petition. The director acknowledged witnesses' statements regarding the petitioner's skills, but found that expertise in one's field does not guarantee approval of the waiver. The director also found that the petitioner's work lacks national scope.

On appeal, counsel again describes several specific projects that the petitioner has undertaken for the Red Cross and federal entities. These assertions establish the national scope of the petitioner's work, because implementation of these programs has a national effect rather than strictly local applications.

Counsel describes the threat of intrusion into government and corporate computer systems, and asserts that the United States must remain competitive in information technology, but offers no specifics as to how the petitioner has served or will serve the national interest in these areas to an extent that would justify a waiver of the job offer requirement. Counsel merely contends that the petitioner is such an expert in his field that he is sure to benefit the United States through his future efforts.

Throughout the proceeding, counsel has contended that the job offer/labor certification requirement does not apply because the petitioner's employer has no desire to replace the petitioner with a United States worker. Nothing in the statute or regulations, however, indicates that the job offer requirement applies only when the employer desires to replace an alien worker. Indeed, no employer would seek a labor certification for an employee that the employer wished to replace. The question is not whether the employer wants to retain the petitioner's services, but whether it is in the national interest to deprive qualified United States workers of the opportunity to compete for the position.

By statute, either exceptional ability or an advanced degree is a necessary, but not sufficient, basis for the national interest waiver. In the present proceeding, the petitioner has established several years of experience in his field, often working for high-profile clients, but the evidence submitted does not establish that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. The petitioner also has not established eligibility for either of the two underlying immigrant classifications that would permit him to apply for the waiver in the first place.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.